

OUANO (Migration) [2022] AATA 1284 (19 April 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Janna Maia Dinolan OUANO Ms Phoebe Mystine Dinolan OUANO Ms Sophia Ysabelle Dinolan OUANO Mr John Matthew Dinolan OUANO
REPRESENTATIVE:	Ms CYRIL GABITO (MARN: 1383988)
CASE NUMBER:	1925345
HOME AFFAIRS REFERENCE(S):	BCC2018/3704404
MEMBER:	Peter Emmerton
DATE:	19 April 2022
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations • The Tribunal finds that the secondary applicants are member of a family unit of a person who satisfies the primary criteria of cl.820.211 and cl.820.221.

Statement made on 19 April 2022 at 11:55am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing spousal relationship – demonstrated pooling of financial resources – joint tenancy responsibility and liability – lengthy family cohabitation in Australia – social recognition of the relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

SZOXP v MINISTER FOR IMMIGRATION AND BORDER PROTECTION BC201505033

[2015] FCAFC 69

1.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The first named applicant (the applicant) applied for the visa on 11 June 2018 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because they were not satisfied that they were in a genuine spousal relationship.
5. The applicant appeared before the Tribunal, via video, on 19 April 2022 to give evidence and present arguments. The Tribunal also received evidence from the Sponsor Mr Catalino Jr Taruc Ouano. The 3 secondary applicants made themselves available for the hearing however the Tribunal decided they were not needed as some of the evidence to be discussed was of a personal nature that was inappropriate in their presence.
6. The applicants were represented in relation to the review.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the couple are in a genuine spousal relationship as defined by 5F of the Act.
8. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in doing so, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their individual circumstances.
9. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department.

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This

includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married on 28 May 2007, in the Philippines. A valid Certificate of Marriage was provided to the delegate at the time of application and this evidence is not in dispute. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

13. The applicant lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) and Partner (Residence) (Class BS) (Subclass 801) visa on 11 June 2018.
14. The applicant and the 3 secondary applicants arrived in Australia on 1 April 2018. The applicant is a female Philippines citizen. DOB 12 October 1984, living in Australia.
15. The sponsor is a male, Australian citizen by conferral, DOB 16 May 1983.
16. Both the sponsor and the visa applicant are therefore beyond the age of 18.
17. The applicant and secondary applicants have not travelled outside of Australia since arrival into Australia on 15 February 2018.
18. The Tribunal has considered the documentary evidence provided to both the Department and the Tribunal. The Tribunal has had the benefit of taking oral evidence from the visa applicant and the sponsor.
19. The following additional Declarations / Statements were provided to the Tribunal.
 - Statutory Declaration of Cerenia Kyriacou - previous housemate, 3 April 2022,
 - Statutory declaration of Leonarda Jarret – previous housemate, 3 April 2022
20. The Tribunal has considered all aspects of the relationship. The Tribunal notes that in the period between the delegate's decision and the hearing before the Tribunal, it has been possible for the parties to gather and present additional relevant evidence for consideration. A substantial amount of additional and relevant evidence was presented prior to the hearing.

21. Financial Aspects

22. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered joint asset ownership, joint liabilities, pooling of financial resources, legal obligations and the sharing of daily household expenses. The delegate was not satisfied that the couple had demonstrated that the financial aspects of the relationship were consistent with two people in a genuine and continuing relationship.
23. The Tribunal accepts into evidence the following documents, which in addition to the many documents provided to the delegate at the time of the original decision, clearly demonstrate a degree of financial inter-dependence.
 - RIA money transfers (19 pages) from 1 Jan 2012 to 31 Dec 2017, RIA money orders from 1 Jan 2018 to 3 Sept 2020,

- Further RIA payment slips (approximately 26 pages) ranging from 28 Oct 2011 to 15 Jun 2012
 - Commonwealth Bank Statements from 28 Jan 2020 to 30 Jun 2020, and 31 Dec 2020 to 30 Jun 2021
 - Medicare request for confirmation of Safety Net threshold details – 29 May 2020
 - Statement of Medicare benefits 1 Sep 2020
 - Health summary sheet of Mrs Janna Ouano – Ingle Farm Medical Centre 8 Jun 2021.
 - Australian Superannuation nominated beneficiaries letter 19 Mar 2020
 - Member Profile Report of Catalino Jr Ouano 1 Apr 2022 – including transactions
 - Notice of Assessment Mrs Janna Maia D Ouano 30 Jun 2020
 - Joint Dept of Education purchase invoices of 19 Aug 2020 and 23 Feb 2022
 - Service SA joint vehicle registration commencing 12 Apr 2022
 - Other family docs including TFN Application Number
24. The joint bank account clearly demonstrates the pooling of financial resources as a couple. They demonstrate a transfer of monies to pay a joint rental agreement for their current housing. They also demonstrate the purchase jointly of day-to-day household items and food.
25. Fixed Term Residential Tenancy Agreement and the associated Bond Lodgement form, both demonstrate joint tenancy responsibility and liability.
26. The Tribunal notes the evidence in the form of money transfer receipts, over a period of many years submitted to and accepted by the Tribunal, in relation to the sponsor's financial support of the visa applicants prior to their arrival in Australia.
27. The Tribunal does not find the fact that the sponsor left the Phillipines for work in Australia and the United Arab Emirates surprising or untoward. In the experience of the Tribunal this is a common place practice and culturally aligned. This is an accepted way for individuals to support their families with a higher standard of living than could be achieved in a low remunerating economy in their place of origin. There are calculated to be many millions of Phillipine nationals living in other countries, repatriating funds home to their families and visiting as regularly as possible. This is clearly the case in this instance and demonstrated by the travel movement documentation available to the Tribunal.
28. The Tribunal places substantial weight on the forementioned evidence, much of which was cross-referenced at the hearing. It is satisfied that the applicant demonstrated that the financial aspects of the relationship were consistent with two people in a genuine and continuing relationship.
29. **Nature of the Household**
30. When assessing the nature of the household the Tribunal has considered the domestic living arrangements, shared household duties, daily routines and caring for children. The delegate

was not satisfied that the couple were able to demonstrate, that the nature of their household, was consistent with two people in a genuine and continuing spousal relationship.

31. The Tribunal accepts that evidence provided which indicates that the applicant and sponsor have jointly lived at the same addresses for a substantial period of time, (4 years approximately), since they recommenced cohabitation along with their 3 children in Adelaide, South Australia, in June 2018. Evidence was provided of the residence in which they cohabited along with the secondary applicants schooling arrangements. School reports of Sophia Ouano and Matthew Ouano and Phoebe Mystine Ouano were provided.
32. It is acknowledged that it is difficult to demonstrate a joint household when the couple are separated by geography and only cohabit for relatively brief periods of time. The Tribunal note the periods of time spent together and the parenting that occurred. It has been furnished with substantial records indicating meaningful communication when the family and the couple were separated.
33. The Tribunal again notes its, statements in paragraph 25 of this decision in relation to living apart for substantial periods of time. It further notes the principle stated that a couple must not have to live together but must not live separately and apart on a permanent basis, which was handed down in *SZOX v MINISTER FOR IMMIGRATION AND BORDER PROTECTION BC201505033 [2015] FCAFC 69*. It is also observed that the couple have been cohabiting, with their family for 4 years in Adelaide SA.
34. Traditional household roles and their application in relation to the sponsor and the applicant were discussed during the hearing. Views were canvassed from the applicant and the sponsor. The Tribunal was satisfied of their correlation.
35. The Tribunal places substantial weight on this evidence. The Tribunal is satisfied that the applicant demonstrated that the nature of the household is consistent with two people in a genuine and continuing relationship.

36. Social aspects

37. In assessing the social aspects of the relationship, the Tribunal has considered social interactions, evidence of joint social activities, representation of their relationship to others and recognition of the relationship by friends and family
38. The applicants submitted a wide range of annotated photographs showing what appear to be spontaneous snap shots of various social activities together or as a family unit with friends. Family functions were additionally shown. These photographs were corroborated by verbal evidence. The Tribunal additionally notes the content of the Statutory Declarations made prior to the hearing which indicate an understanding of the couple and their family unit.
39. Clearly the sponsor has not had the opportunity to join the applicant and their children in most of the family, school, religious and other social events in all those years that he has been working overseas. Similarly, the sponsor was likewise deprived of celebrating wedding anniversaries with the applicant, as well as the birthdays of their children, Christmas and New Year whilst he was away as an OFW (Overseas Filipino Worker). This social and familial deprivation suffered by the sponsor, does in the eyes of the Tribunal suggests a strong commitment to the family unit.
40. The applicant and the sponsor's youngest children go to Fulham Gardens Primary School and their eldest attends Henley High School. It appears from the evidence submitted that their teachers, classmates, school officials, friends know and recognize the applicant and sponsor as their parents. Written confirmation in the form of accounts and school reports as

well as photographs and verbal confirmation at the hearing support this assertion. The documentary evidence clearly demonstrates the fact that the sponsor, the applicant and the secondary applicants are perceived by many, as a family unit.

41. The Tribunal places substantial weight on this evidence. The Tribunal is satisfied that the applicant and the sponsor demonstrated that the social aspects of the relationship were consistent with two people in a genuine and continuing relationship.

42. Nature of the Commitment

43. In relation to the nature of the commitment, the Tribunal considered the nature of the parties first meeting, relationship development, length of time living together, degree of companionship and mutual emotional support and whether they see the relationship as long term.
44. In regards, to the development of the relationship, the department accepted that the couple have known each other for a very long time and were married in May 2007. The Tribunal does not dispute this. This was correlated with verbal evidence given during the hearing and documentary evidence.
45. The Tribunal accepts the range of written and verbal evidence demonstrating that the couple have lived together when the sponsor was not living away from his family in different countries for economic necessity. It also acknowledges that he and his wife and children have lived together as a family since 2018 when they arrived in Australia and reunited as a family unit.
46. The sponsor's commitment to his family's welfare is demonstrated by the money remittance record from 2011 to 2018. These documents proved that the applicant never faltered in his effort to provide financial support to the visa applicant and their children.
47. The Tribunal has viewed the appropriate documentation showing the sponsor has named the applicant and their children as beneficiaries in his Superannuation, a copy of the letter from Australian Super confirming the sponsor's named beneficiaries was presented.
48. The not insubstantial evidence provided to the Tribunal detailing the couple's financial interdependence, joint liabilities and responsibilities, (detailed in paragraphs 21-26 of this Decision) shows strong evidence that the couple are mutually committed in an ongoing relationship and form a family unit with their 3 children. This was further reinforced by the general demeanour of the couple. The Tribunal once again notes, that the much of this evidence was not available to the delegate at the time of their decision.
49. The Tribunal notes that the past liaison with an individual outside of marriage has been acknowledged by the sponsor and evidence presented to demonstrate the fact. It is also stated by the sponsor that he has not seen the individual with whom the liaison occurred from the time his family arrived in April 2018. This was quoted by the delegate in their decision. It is not possible to determine exactly when the activity between the 2 parties occurred or ceased. The Tribunal is of the view that it most likely ceased following a fight in December 2015. This was supported by verbal comments provided by the sponsor and applicant when the matter was explored during the hearing. This clearly supports the view formed by the Tribunal that the any inappropriate extra marital activity ceased well before the application for visas was submitted.
50. The delegate of the Minister failed to accept that the Sponsor's affair had long ended before the Applicant arrived in Australia on 1 April 2018. They did not present substantive evidence in support this supposition that would sway the Tribunal.

51. The Tribunal does not have the view that evidence of an indiscretion outside of marriage, which is acknowledged by the married couple indicates that the visa applicant and the sponsor were in fact not in a genuine and continuing relationship and have a mutual commitment to a shared life to the exclusion of all others, and lived together, or not separately and apart, on a permanent basis. Statistically verifiable data shows that extra marital activities are not an uncommon occurrence. Whilst modern Australian social norms may not suggest that such behaviours are acceptable, they also factor in the possibility of forgiveness and redemption.
52. The Tribunal does however form the view that this indicates the frailty of the human condition and a weakness of moral fortitude on the part of the sponsor, in relation to commonly accepted values observed in Australia today. Based upon the Tribunal's knowledge of similar circumstances ranging across the wider society it is unreasonable to penalise an entire family for the inappropriate behaviour of 1 man. The Tribunal has formed a view that it is unlikely that a relationship would continue under such circumstances without a genuine bond. The Tribunal was convinced of the sincerity and genuine nature of the verbal testimony provided by the applicant during the hearing.
53. The Tribunal has placed substantial weight on this evidence.
54. For all of the above reasons, the Tribunal is satisfied that at the time of application and at the time of decision, the visa applicant and the sponsor were in a genuine and continuing relationship and have a mutual commitment to a shared life to the exclusion of all others, and lived together, or not separately and apart, on a permanent basis.
55. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the applicant meets cl.820.211(2)(a) and cl 820.221(1)(a).
56. For the reasons above, the applicant satisfies the criteria for the grant of the visa.
57. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

58. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211 of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations
 - The Tribunal finds that the secondary applicants are members of a family unit of a person who satisfies the primary criteria of cl.820.211 and cl.820.221.

Peter Emmerton
Member

59. ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).